IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1967

No. _____

CONTINENTAL MARKETING CORPORATION,

Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner, CONTINENTAL MARKETING CORPORATION, was a corporation engaged in the business of selling live identified beaver animals on a brokerage basis, and was enjoined

(along with nine co-defendants) by the District Court of the District of Utah from offering for sale or selling beaver animals in violation of the anti fraud provisions contained in Section 17(a), of the Securities Act of 1933, as Amended; 15 U.S.C. 77q(a), Section 10(b), of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5 under a finding that the animals were "investment contracts" and, therefore, "securities", as defined by the Securities Acts and judicial interpretation thereof.

The Supreme Court of the United States has jurisdiction upon appeal to review a judgment of the United States Court of Appeals, as provided in 28 U.S.C.A. Section 1254(1).

The sole question presented is whether the sale of identified personal property without the accompaniment, offer, or even the capability of the seller to furnish a contract or agreement for the care, management, or service of the property constitutes the sale of a "security", as defined by the Securities Act of 1933, and the Securities Exchange Act of 1934.

No decision can be found holding that the sale of personal property without the accompaniment or offer of a contract or agreement for service, retention, or management of the property by the seller or a third person owned or controlled by the seller, constitutes the sale of a "security". Courts have found, however, that the sale of personal property not coupled with a management or service contract, but advising

the purchaser from whom such a service or management contract could be obtained was not the sale of a "security" or investment contract. It is submitted that this case represents a clear departure from the law as it existed in holding the sale of personal property separate and apart from, and without any offer of, any management or service agreement or contract to constitute the sale of an "investment contract", and, therefore, a security.

For the foregoing reasons, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

This supporting brief is presented in connection with the Petition for Certiorari, as provided in Rule 38(2), of the Rules of the Supreme Court.

This case was largely influenced in its decision by both the District Court for the District of Utah and the United States Court of Appeals for the Tenth Circuit by the language of the Supreme Court of the United States contained in the Opinion rendered in the matter of Securities and Exchange Commission v. W. J. Howey Co. (1946), 328 U.S. 293, at 301:

"The test is whether the scheme involves

an investment of money in a common enterprises with profits to come solely from the efforts of others."

The facts in Howey were that investors were offered parcels of real property with growing orange trees in combination with service contracts with the company owned by Howey called Howey-in-the Hills Service, Inc., and the arrangement was properly held to constitute an "investment contract". However, because W. J. Howey Co. offered the property in conjunction with a service contract to be performed by a separate corporation largely owned by Howey, the quoted language above was not necessary to a decision of the case, and the quoted language was not used to define the concept of an "investment contract" but was contained in a paragraph rejecting the suggestion of the Circuit Court of Appeals that an investment contract is missing where the enterprise is not speculative or promotional in character.

Roe v. United States (1961), 287 F. 2d 435, was also persuasive in the decision of this case. The Court of Appeals was impressed by the language on Page 439, as follows:

"The promoters were selling a chance to make a great deal of money from activities which were then, or would shortly be, carried on by persons other than the purchasers. In that setting it mattered not whether the test wells were to be drilled by sellers, or by third persons either under or independent of their

control."

However, the facts in Roe v. United States were that fractional oil interests were being sold coupled with promises of a proposed test well to be drilled upon the property by the seller and the location of additional deposits by the seller by a method used and perfected by the seller. Therefore, here again, the quoted language was unnecessary to the decision, and, as a matter of fact, the court took the pains to point out the fact that the drilling of the well was controlled by, and was a promise made by and contemplated to be performed by the seller in the following language, at Page 439:

> "In addition, considering that Roe was the president and dominating character of Stratoray through whom Stratoray alone acted for much of the period involved, this record warrants a holding that each had, directly or indirectly, made substantial contributions toward the test wells. In the Texas area, it was a contribution of a section of leases to the driller of the well. In Utah, it was the substantial payment of cash through the instrument of another corporation dominated and later wholly-owned by Roe. More than that, the sales letters openly boasted that the locations of the test wells had been fixed by Roe through the use of his 'gamma ray scintillator unit' . . . . ."

In Union Land Associates v. Ussher (1944),

174 Oregon 453, 149 P. 2d 568, the Supreme Court of Oregon reviewed the sale of oyster beds by a seller who did not offer a service contract for the harvesting of the oysters, but under circumstances where the seller advised the purchaser where the services could be obtained from two firms engaged in the harvesting of the oysters. The opinion of the Supreme Court states in part, on Page 458:

> "In the instant case, there is no sale of any security or 'investment contract' within the meaning of the act. There is no obligation on the part of plaintiff's vendors to do anything under the contract other than deliver the deed upon the payment of the purchase price. Neither was the contract of purchase connected with any promotion scheme involving the sharing of expected profits to be made through the efforts of the seller."

Regardless of the language quoted above, the facts of the cases reviewed, and many other cases not included in this brief, demonstrate that the courts have found an investment contract to be present only when the seller sold property coupled with, or offering, a service or management contract or agreement to be

performed by the seller, his agent, or by a corporation owned or controlled by the seller.

Respectfully submitted,

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